

EXECUTIVE LEGAL SUMMARY

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The Medical Background

A brief discussion of the medical concepts relating to AIDS is important, in that these distinctions serve as the basis for what employers can and cannot do. The term "AIDS" is sometimes used too broadly. There are actually three different but related stages.

1. **Seropositive.** These are people who test positively on the tests which show whether or not the AIDS antibody is present in the blood system. Generally, these people have no symptoms of any disease, and may or may not ever develop AIDS. Unfortunately, medical science has not yet discovered enough information to know even approximately how many people "convert" from seropositive to an actual AIDS condition. The current estimate is between 20-35%. The key point is that, while this estimate is high, it is less than 100%. Therefore, any employment decision based on the assumption that everyone who is seropositive will get AIDS and die

would be suspect.

2. **AIDS Related Complex (ARC).** These are seropositive people who have some of the clinical symptoms that may precede AIDS, such as weight loss or enlarged lymph glands, but who do not have the presence of the opportunistic infections or cancers which generally cause an AIDS patient to die. Opportunistic infections are those for which the viruses are generally present, but which normal people can resist because of their immune system. Again, medical science cannot tell us what percentage of those with ARC may convert to AIDS, but the estimate is higher than for those who are only seropositive.

3. **Acquired Immune Deficiency Syndrome (AIDS).** Sometimes these people are referred to as having "full blown AIDS" or "actual AIDS." These are the people who not only have clinical symptoms, which are usually either "opportunistic infections" or unusual cancers, but who also have the presence of a diminished immune system.

We can see that there is a spectrum, and that the lines between the various stages are by no means bright. When we ask what we can or should do from a legal perspective, we must be sure to focus separately on these three stages.

HTLV III/LAV

This is the medical term for the virus which the doctors are almost certain causes AIDS.

The Tests

Doctors test for the virus indirectly by testing the blood to see if the person has antibodies to the virus. The testing procedure is as follows. First, the doctors use an "ELISA" test, which is a public health test developed to screen blood so that AIDS is not transmitted by blood transfusion. If that test is positive, it is repeated. The key point is that this test was developed to give many "false positives," in other words, to err on the side of excluding any blood which *might* be infected. Since there are so many false positives even with two ELISA tests, the doctors administer a third test, known as the "Western Blot" test. If that is positive, we can be reasonably sure that the person has been exposed to HTLV III/LAV because the person has developed antibodies to that virus. The presence of those antibodies alerts us to the past exposure.

What is the medical significance of being seropositive (i.e., undergoing all three tests with all of them showing that you have the antibodies to the AIDS virus)? The doctors are unclear, but to be on the safe side, they say this.

1. We must assume that a seropositive person has been exposed to the AIDS virus and that the AIDS virus is still in that person's system, so that it is possible that he will progress from merely being seropositive to having ARC or AIDS. The AIDS virus, unlike most, remains in a person forever. The virus itself may never

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erupt into ARC or AIDS, but it never goes away.

2. We must assume that this person, since he may have the AIDS virus in his system, can transmit that virus to others.

How Is AIDS Transmitted?

The doctors universally agree that AIDS is transmitted primarily, if not almost exclusively, by intimate sexual contact, by the use of a contaminated needle (usually in the context of drug use), or by blood transfusion. *Casual contact does not transmit AIDS.*

However, and this is where we start running into controversy, the AIDS virus has been found in virtually all bodily fluids, including tears and saliva. Further, the disease is so new that the doctors are not in a position to *guarantee* that AIDS cannot be transmitted through less than intimate sexual contact. Since the doctors will guarantee one thing — AIDS is basically always fatal — we do have an AIDS hysteria because of the possibility, however remote, that it might be transmittable in a more casual way than the doctors now recognize.

The statistics clearly show that the odds are slim if not nonexistent of getting AIDS from other than intimate sexual contact, a blood transfusion, or sharing drug needles. Indeed, no such case is known to medical doctors (although there are some isolated cases in which the doctors cannot explain how the person got the AIDS).

AIDS Is Not a Homosexual Disease

Homosexual males are a "high-risk group." However, AIDS is and has been spread in the heterosexual community, and the spread is bi-directional. Men can get it from women and women can get it from men..

How Is the AIDS Virus Killed Outside the Body?

Clorox diluted 1 to 10 or any similar substance, including Lysol, kills the virus. The AIDS virus dies easily outside the body.

What Are the Legal Issues?

Basically, there are four legal issues..

1. ***Can an employer refuse to hire people who are seropositive, have ARC, or have AIDS?*** The probable answers are no for seropositive and ARC victims. For AIDS, it depends on whether or not the person could reasonably be expected to do the job.

2. ***Can (or should) an employer test all applicants or present employees for AIDS?*** (In other words, can it require the ELISA and Western Blot tests as a condition of employment?) The answer is that an employer probably could, but it is not a good idea. An employer cannot take any action based on the results of the test and, thus, is only asking for legal trouble by conducting the test and having the results in its files.

3. ***What can/should an employer do if there is coworker pressure, i.e., how do we deal with the AIDS hysteria factor?*** The answer is that the employer should deal with the problem by education and persuasion, not by getting rid of the victim.

4. ***What planning should be done, or what programs should be implemented in advance of the problem?*** Most people recommend advance thought and an education program emphasizing that it is basically impossible to transmit AIDS in the work environment. Some recommend

that you stop at the advance thought. In other words, get an idea of what you would do, but do not take any specific steps unless or until you have a problem.

What Are the Applicable Laws and What Do They Say?

The most applicable laws are those dealing with discrimination against the handicapped. There are two sets of these laws. One set consists of federal laws which govern federal employers and government contractors — anyone receiving government funds. The other set consists of the state handicap laws, which vary widely.

The federal law defines a handicapped person as one who:

- (a) *has a physical or mental impairment which substantially limits one or more of such person's major life activities;*
- (b) *has a record of such impairment, or*
- (c) *is regarded as having such an impairment.*

The prevailing view is that a person who is seropositive, or who actually has ARC or AIDS, would qualify under this definition, although there are no cases deciding the issue. Thus, if you discriminate against such people in either your hiring or firing, and you are covered by this federal law, you could have a problem.

The state handicap laws sometimes simply copy the federal definition, sometimes use their own definition, and sometimes do not have any definition of "handicapped." One of the things we should be doing in our

advance planning is finding out what our own state laws may say about the definition of "handicap," and whether the definition might include seropositive, ARC, or AIDS.

The National Labor Relations Act

If workers engage in "concerted activity," they are protected by the National Labor Relations Act. This is true whether or not they are members of a collective bargaining unit. However, the NLRA does not protect joint activity for an illegal purpose. Therefore, if a group of employees joined together to ask for the removal of a person protected by federal or state handicap laws, the NLRA would not protect them if the relevant state law defined AIDS, ARC or seropositive as a handicap, or if the federal law applied to that workplace.

Employee Retirement Income Security Act (ERISA)

ERISA makes it illegal to discharge someone for making a claim against his retirement benefits, or for the purpose of preventing the person from making such a claim. Thus, if you fire a person who is seropositive, or who has ARC or AIDS in order to save the tremendous cost of treating him, that would be a violation of ERISA. The statutory words are as follows.

It shall be unlawful for any person to discharge, fire, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

The ERISA definition of "benefit plan" is very broad and includes any health, disability, or life insurance program.

Antidiscrimination Laws

Our civil rights laws prohibiting discrimination in employment might also apply to a situation where AIDS was singled out as a reason for failure

to hire or other discriminatory actions. The logic would be that 75% (the majority) of AIDS sufferers are male, and males are a protected class. The cases finding males to be a protected class are those holding that airlines cannot discriminate against males who apply for flight attendant jobs simply because passengers would rather have stewardesses than stewards.

OSHA

The Occupational Safety and Health Act requires all employers to provide a place of employment which is free from recognized hazards. Given the medical evidence to date, it is highly unlikely that the simple presence of an AIDS, ARC or seropositive victim in the workplace would make it "hazardous."

Right of Privacy

Almost all state laws recognize the right of privacy, although the parameters of this right are unclear. The obvious problem with AIDS is that, because of both normal and hysterical concerns, disclosing the results of a seropositive test could make someone virtually unemployable. If the test results kept in the employer's files were to leak out to the wrong person, a serious invasion of privacy claim might result.

Unjust Dismissal Law

The current trend toward imposing liability on companies for "unjust dismissal" is relevant to the AIDS problem because of the AIDS hysteria factor. If the manager of a facility finds out that an employee is seropositive, or has ARC or AIDS, and then puts all of that person's possessions outside the office, scrubs down the office with Lysol, fires the person, and asks him not to come back onto the property, the company would be opened to an unjust dismissal suit.

Miscellaneous Considerations

What about Cost?

The employer's claim that it should be able to discharge or refuse to hire

a person who has AIDS or ARC or who is seropositive because of the high cost of health care, while certainly true in an economic sense, probably would not be upheld in court.

What about Coworker Preferences or Biases?

These probably would not be given effect by the court, based on a rationale similar to that used in the civil rights cases. You cannot refuse to hire males, females, or blacks, and so forth, based on coworker preferences, nor can you discriminate against them in any other way.

What about Protecting the AIDS Victim Himself?

This issue is a little unclear. Since AIDS is an impairment of the immune system, that means that a person with AIDS would be abnormally susceptible to infection. If the person were, for example, employed in a hospital or someplace else where there was a high likelihood of getting an infection from sources not normally hazardous to non-AIDS victims, it may be that the employer could, or even should, prohibit the person from working there. Certainly if the person's own doctor recommended against such employment, the employer would be protected.

What about Coworker Safety Concerns?

This is similar to the problem above. People with AIDS have or may develop very unusual infections, the most serious of which may be tuberculosis (TB). Since the person with AIDS may have these rare illnesses and may transmit them to healthy workers, should not the employer be able to eliminate the AIDS-infected person from the workplace because of this potential problem?

Since the AIDS problem is so new, the doctors are not in universal agreement on this question. The prevailing view, however, is that an AIDS patient with these unusual infections or cancers really does not present a problem to healthy people because a

healthy person's immune system would be effective against any germs transmitted.

The one exception is TB. It may be necessary or appropriate to have any known AIDS or ARC patients tested periodically for TB.

How Much Do We Have to Accommodate the AIDS Victim?

Some, but not much. The law would be the same as for any other handicap, so to some extent we make our own rules according to past practice. In general, however, the handicap laws protect only people who are "otherwise able to do the job." Thus, for a seropositive person, no accommodation would be necessary. For an ARC person, any accommodation would probably be slight and temporary and might, therefore, be required. For an AIDS person, however, we would have to look carefully at the job, and how AIDS affected this person. Being a virus, AIDS affects everyone differently. In general, courts have imposed only modest duties of accommodation. The courts do not require an employer to incur extra costs, or significant rescheduling, nor to burden other workers by requiring them to do a portion of the handicapped worker's job. The courts may require an employer to incur a *de minimis* amount of expense, or to provide other forms of accommodation such as allowing time off for treatment where that does not affect production and where it is allowed for other illnesses.

What about a Job with a Lengthy Training Period?

This is not quite as clear. Suppose you have a known seropositive, ARC or AIDS victim applying for a job with a lengthy learning curve, such as that of a pilot or a policeman, or a job involving an apprenticeship. The best judgment at this time is that the AIDS-infected person could be excluded, either by not hiring him or by taking him out of the training program when the AIDS was discovered. The seropositive person *probably* could not be excluded and, in the case of the ARC person, it would simply be too close to call without precise facts. The

basis for saying that you probably could not exclude the seropositive person comes from cases like *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088 (1980), which held that you could not exclude from a construction job a person with congenital back problems. To exclude someone because of a handicap, you must be able to show that he is *presently unable to perform the job*, not merely that he would likely become unable to do so in the future. There was also a recent case involving Xerox where an obese person was held to be protected by the state's handicap laws. The fact that obese persons have higher than normal insurance claims and lower than normal life expectancy does not mean you can exclude them from a job that they are presently able to perform. Other relevant authority says that it is not proper to use sex segregated actuarial tables for employee benefits. No one disputes the fact that women live longer than men, but as a matter of policy, it is required that we use unisex actuarial tables in computing benefits based on life expectancy.

What about the Military?

Some employers are tempted to look to the military as a model. The military is planning to test all applicants and members for AIDS. Applicants who test seropositive will not be accepted. Those already in the military who test seropositive will be subject to monitoring.

However, the military situation is rather different from that of private industry. First, the military is required to vaccinate all personnel with a live smallpox vaccine. Someone with AIDS may very well have a severe problem with that! Second, the military feels that everyone on the battlefield should be a potential blood donor. A seropositive person should not be allowed to give blood to anyone.

When the military announced that it was going to adopt this program, it said that one of the reasons (indeed the first listed) was that it did not want to incur the costs of treating people with AIDS. That rationale, while not illegal for the military to use, probably would not hold

up for private industry.

What Do Hospitals Do?

Hospitals generally treat AIDS patients similarly to those with hepatitis (a liver disease which can be highly contagious). They separate the patient from others, and put signs on the patient's room stating that blood and secretion precautions should be used. This means that everyone going into the room washes his hands, wears gloves, and so forth.

What about Schools?

In some highly publicized cases, children with AIDS have been excluded from school based on state or local laws, which say that people with "communicable diseases" either cannot or should not be allowed in public school. The question is whether AIDS, being transmittable only by intimate sexual contact, is a communicable disease within the meaning of these laws. New York has recently ruled that it is not.

Summary of Key Points

1. The term "AIDS" actually covers three different stages: seropositive, ARC, and "full blown AIDS." These medical distinctions are important in that they serve as the basis for what employers can and cannot legally do:

2. The basic legal issues surrounding the AIDS problem relate to refusal to hire people with AIDS, testing of applicants and/or employees for AIDS, dealing with coworker pressure, and advance planning to deal with these concerns.

3. A broad range of laws may apply to protect the employee with AIDS, including federal and state handicap laws, the National Labor Relations Act, ERISA, the civil rights laws, state privacy laws, and unjust dismissal law.

4. Employers probably have a duty to accommodate the AIDS victim to the same extent as with any other "handicap," as long as the person is presently otherwise able to do the job. Most courts require only a *de minimis* amount of accommodation.

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